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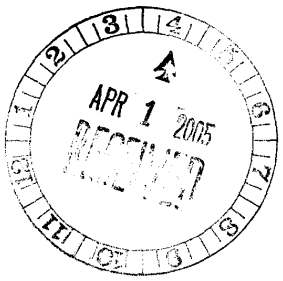

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April 1, 2005

BY HAND

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001

Re: Docket No. 42060 (Sub-No. 1) – North America Freight Car Association v. BNSF Railway Company

Dear Secretary Williams:

By letter dated March 14, 2005 ("March 14 Motion"), the North American Freight Car Association ("NAFCA") moved to amend its nearly four-year-old Complaint in this proceeding. NAFCA seeks to add numerous affiliates and subsidiaries of the named Complainants as additional Plaintiffs. BNSF Railway Company ("BNSF") opposes NAFCA's Motion. [1]

NAFCA first filed its Complaint in this subdocket on August 29, 2001. NAFCA brought its Complaint "on behalf of itself and 11 of its members ('Complainants') listed in Appendix A hereto who seek affirmative relief including damages, if appropriate." Compl. ¶ 1.[2] NAFCA

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[1] NAFCA did not style its letter as a Motion to File an Amended Complaint. As explained in this Reply, because the proposed amendments are not contemplated by 49 C.F.R. § 1111.2, BNSF is treating NAFCA's March 14 letter as a motion. Accordingly, and because the text of the proposed Amended Complaint merely adds new parties to the caption, BNSF is not filing an Answer to the proposed Amended Complaint. To the extent an Answer to the proposed Amended Complaint is required, BNSF incorporates, by reference, its September 18, 2001 Answer in this proceeding as though it was set forth against all of the Complainants identified in the proposed Amended Complaint.

[2] Appendix A to the Complaint lists the following companies as Complainants: A.E. Staley Manufacturing Company, Ag Processing Inc., Archer Daniels Midland Company, Bunge North America, Inc., Cargill, Incorporated, Cenex Harvest States Cooperative, Chicago Freight Car Leasing Company, ConAgra Trade Group, First Union Rail, GLNX Corporation, and The David Joseph Company. The David Joseph Company is no longer participating in these proceedings, and two companies have changed their names. *See* March 14 Motion at 1 n.1 (noting that A.E. Staley Manufacturing Company is now Tate & Lyle Ingredients Americas, Inc., and ConAgra Trade Group is now ConAgra Food Ingredients Company).

explicitly ***disclaimed representation*** on behalf of any of its "members whose names are not listed in Appendix A." Compl. ¶ 1 n.1. BNSF filed its Answer on September 18, 2001, and shortly thereafter filed a Motion to Dismiss. On August 11, 2004, the Board denied BNSF's Motion to Dismiss and directed the parties to submit a joint procedural schedule. By Order dated January 6, 2005, the Board adopted a procedural schedule that contemplated the completion of written discovery by March 22, 2005 and the completion of depositions by April 25, 2005. NAFCA "and 10 of its individual members" subsequently sought an extension of the procedural schedule. Order, March 18, 2005, at 1. That request was granted by the Board, allowing written discovery to be completed no later than April 15, 2005 and depositions to be completed no later than May 20, 2005. *Id.* at 2.

NAFCA now seeks to amend its Complaint to "clarify that each named Complainant's affiliates and subsidiaries are parties to the Complaint." March 14 Motion at 1. But NAFCA's request is more than a mere clarification of its nearly four-year-old Complaint. If granted, NAFCA's Motion will expand – exponentially – the scope of this case to the extent that the heretofore-unidentified affiliates and subsidiaries become parties to this proceeding and seek to recover damages from BNSF.

NAFCA's motion should be denied for two reasons. *First*, the regulation cited by NAFCA as the basis for its filing of an Amended Complaint does not permit a complaint to be amended to add additional parties. Instead, it explicitly provides that "[a]n amended or supplemental complaint may be tendered for filing ***by a complainant*** against a defendant or defendants ***named in the original complaint.***" 49 C.F.R. § 1111.2. Thus, an amended complaint may only be filed by a complainant named in the original complaint who seeks to assert additional claims against a defendant or defendants named in the original complaint; an amended complaint may not be used to add additional complainants who were not named in the original complaint.

Second, the Board's regulation regarding the filing of amended complaints requires that an amended complaint "stat[e] a cause of action alleged to have accrued ***within the statutory period immediately preceding the date of such tender***" of the amended complaint. 49 C.F.R. § 1111.2 (emphasis added). *See also South-West Railroad Car Parts Co. v. Missouri Pac. R.R. Co.*, No. 40073, 1988 I.C.C. Lexis 370, at *7-*8 (Dec. 1, 1988) (I.C.C. has "not allowed an amended complaint to relate back to a period beyond the statute of limitations"). But NAFCA is attempting an end-run around that express regulatory prohibition by seeking to assert claims that accrued more than two years before the filing of its motion. *See* March 14 Motion at 4 ("The Amended Complaint obviates any need for the Board to decide at this juncture which parties, if any, are entitled to recover monetary damages or [sic] the period for which such damages are recoverable."). The Board should reject NAFCA's gambit.

As the Board's predecessor has noted, statutes of limitation "afford[ ] carriers a vital measure of commercial certainty, since they know that beyond a certain time they are not liable for refunds on revenues they have collected. Adequate financial planning requires some degree of certainty. That is a purpose of the statute of limitations." *South-West Railroad Car Parts Co.*,

1988 I.C.C. Lexis 370, at *7. On that basis, the I.C.C. rejected an attempt to "treat [an] amended complaint as relating far back, to encompass the 2-year period preceding the original complaint" because it would require the agency "to defeat the purpose underlying the statute of limitations and our implementing rule." *Id.* But that is precisely what NAFCA endeavors to do here. By attempting to litigate claims by affiliates and subsidiaries that are now more than two years old, NAFCA is robbing BNSF of commercial certainty and its ability to engage in adequate financial planning.

The older I.C.C. precedent cited on page 3 of NAFCA's Motion actually reinforces the principle that notice within the limitations period is a necessary (though not sufficient) prerequisite to asserting a claim. A critical fact in both decisions is that an informal complaint was filed within the relevant limitations period that identified the precise shipments for which plaintiffs sought reparations, thus providing defendant with notice of the claims. In *Samuel Werner, Inc. v. Director*, the I.C.C. found that an informal complaint filed by consignees seeking reparations tolled the statute of limitations for consignors who were later identified in the formal complaint that was filed after the statute of limitations had run. 107 I.C.C. 363, 365 (1926). Tellingly, the I.C.C. limited its holding to those specific shipments that were identified within the limitations period and ***excluded from its holding a shipment that was not previously identified during the limitations period***. *Id.* at 364.[3] Similarly, in *International Agricultural Corporation v. Louisville & Nashville Railroad Company*, complainant prepared "complete lists of all shipments with respect to which it claimed reparation" and "which were served upon the defendants." 29 I.C.C. 391, 393 (1914). Only after the two year statute of limitations had elapsed did it appear that the freight for certain of those shipments had been paid by consignees rather than the complainant. *Id.* at 393. But unlike *Werner*, the previous identification of shipments was not enough; the I.C.C. ***rejected*** complainant's argument that it should be able to recover on behalf of the consignee. *Id.* at 393-95. Here, of course, claims by the newly-identified affiliates and subsidiaries represent entirely new movements for which BNSF had no prior notice. This case is entirely different, then, from *Werner* and *International Agricultural Corporation*, in which the defendant had notice – from day one – of the shipments involved, the scope of the parties' claims, and its potential liability. And because neither case involved the filing of an ***amended complaint***, neither speaks directly to NAFCA's attempt pursuant to Section 1111.2 to add new parties.

The Board's unambiguous regulations and clear precedent provide a firm foundation for denying NAFCA's motion. But to the extent the Board needs additional authority to resolve this dispute, the treatment of amended complaints by federal courts reinforces the impropriety of NAFCA's attempt to add new plaintiffs at this late date. Pursuant to Rule 15 of the Federal

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[3] The agency relationship between the consignor and the consignee was also critical to the I.C.C.'s analysis. *Werner*, 107 I.C.C. at 365-66 (finding that the consignee had a duty "to take the necessary measures to protect in the matter of freight charges not only its own interests but also that of the consignors with whom it shared equally in the profits"). NAFCA has presented no evidence that such an agency relationship exists here.

Rules of Civil Procedure, an amended complaint seeking to add new plaintiffs relates back to avoid the applicable statute of limitations if a defendant "had notice of the additional plaintiff and [its] claim." *Fleck v. Cablevision VII, Inc.*, 799 F. Supp. 187, 191 (D.D.C. 1992). "A defendant has notice of the claims of an additional plaintiff if it is ***aware of the existence of the new plaintiff's claims and of the involvement of the new plaintiff in the original action***." *Id.* (emphasis added). *See also Leachman v. Beech Aircraft Corp.*, 694 F.2d 1301, 1309 (D.C. Cir. 1983) ("The touchstone once again is whether the defendant knew or should have known of the ***existence and involvement*** of the new plaintiff.") (emphasis added); *Williams v. United States*, 405 F.2d 234, 238 (5th Cir. 1968) ("Not only must the adversary have had notice about the operational facts, but it must have had fair ***notice that a legal claim existed in and was in effect being asserted by, the party belatedly brought in.***") (emphasis added); *Pappion v. Dow Chem. Co.*, 627 F. Supp. 1576, 1580 (W.D. La. 1986) (same). Thus, for example, a plaintiff widow's attempt to amend her complaint and add her children's wrongful death claims after the applicable statute of limitations had run was rejected because the defendant "did not know that [the children were involved in] this action." *Pappion*, 627 F. Supp. at 1581. And in *Fleck*, the court allowed plaintiffs to amend their securities fraud complaint to add a plaintiff. However, in that case "[t]he original complaint allege[d] a harm to the partnership," and the additional plaintiff was a member of that partnership. *Fleck*, 799 F. Supp. at 191-92. On that basis, the court found that the defendants "had notice of [the partner's] potential claim." *Id.* at 192.[4]

Here, BNSF had no notice of the potential claims of the Complainants' affiliates and subsidiaries. Until Complainants broached the subject with BNSF during discovery (March 14 Motion at 2), BNSF was not on notice that NAFCA was asserting claims on behalf of those entities. To the contrary, NAFCA explicitly ***disclaimed that it was representing any entity other than those parties listed in Appendix A to the Complaint.*** *See* Compl. ¶ 1 n.1. For that reason, NAFCA's argument that "BNSF has been dealing with Complainants' corporate 'families' on an integrated basis for years" avails them nothing. March 14 Motion at 3. Assuming that statement to be true, mere knowledge of the existence of these subsidiaries is insufficient to impute knowledge that BNSF knew that those subsidiaries had legal claims that they sought to assert against BNSF. *See Leachman*, 694 F.2d at 1309 (requiring knowledge of "existence and involvement" of proposed new plaintiff); *Williams*, 405 F.2d at 238 (requiring notice that a legal

[4] The court also found that the defendant had adequate notice of the additional plaintiff's claims because the case was originally brought as a putative class action. *Fleck*, 799 F. Supp. at 192. That fact is not relevant here.

claim was being asserted by proposed new plaintiff). Such knowledge is a prerequisite for an amended complaint to relate back to the filing of an original complaint.

For the foregoing reasons, NAFCA's Motion to Amend the Complaint should be denied.

Sincerely yours,

Robert M. Jenkins III
Counsel for BNSF Railway Company

cc: Andrew P. Goldstein
Sidney L. Strickland, Jr.